

PROTECTING THE ORIGINALIST CONSTITUTION

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My subject is Article V, the amendment process itself. The capacity of the people to change their fundamental laws surely qualifies as a first principle of constitutionalism. This essay makes three points. First, constitutional amendments are the best way of updating our Constitution. The consensus they require is likely to create better improvements than judicial updating that comes from non-originalist approaches to interpreting the Constitution. Second, unfortunately, constitutional updating by the Supreme Court has directly interfered with Article V because it incentivizes people to work through the courts rather than through the amendment process. We thus need originalism to make the process work as well as it can. Finally, this essay discusses constitutional amendments to the amendment process itself, both to make it function better as a constraint on the power of Congress and to make it easier to amend more generally.

As Michael Rappaport and I describe in great detail in our book, *Originalism and the Good Constitution*, the most striking feature of the amendment process is its requirement of supermajoritarian consensus to change our fundamental law.¹ Article V requires either two-thirds of Congress or two-thirds of the states to propose an amendment, and then three-quarters of the states, through conventions or legislatures, to ratify an amendment.² Supermajoritarian consensus is a good way to make and amend the Constitution.

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1. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 63–80 (2013).

2. U.S. CONST. art. V.

We can see the virtues of supermajoritarian rules for constitutional amendments and constitution-making by contrasting it with majority rule.³ Something close to majority rule is generally thought to be the best approach to ordinary legislation, but permitting a mere majority to entrench provisions in our fundamental law would be problematic.⁴ First, because entrenched norms cannot be easily changed, controversial amendments can be extremely divisive and partisan. Yet a majority tends to enact exactly those divisive and partisan changes.⁵ Supermajority rules happily permit only norms with substantial consensus and bipartisan support to be entrenched.⁶ A broad consensus for constitutional amendments maintains legitimacy, allegiance, and even the affection that citizens feel for their fundamental document as it becomes part of their common bond, making them citizens of a single nation.⁷

The long-term nature of entrenchments also makes it less likely that simple majorities will enact desirable amendments. Individuals have a heuristic problem in thinking about the future; they are often disposed to believe the future is going to be just like the past.⁸ Stock markets and housing bubbles go up and up until they suddenly do not. Supermajority rules compensate for this deficiency by restricting the agenda of proposed amendments because fewer proposals have a realistic chance at being passed.⁹ A restricted agenda encourages a rich-

3. See MCGINNIS & RAPPAPORT, *supra* note 1, at 35–38.

4. *Id.* at 12; John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1171 (2007).

5. MCGINNIS & RAPPAPORT, *supra* note 1, at 39–40 (explaining that simple majorities tend to enact partisan entrenchments for two reasons: “partisan political action is often beneficial to members of a party,” and “legislators may favor partisan behavior even if citizens do not”).

6. *Id.* at 38–39 (explaining how a supermajority entrenchment rule only allows for the entrenchment of those provisions that enjoy consensus support).

7. Cf. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 394 (2004) (stating that constitutionalism helps transcend prior communal identities).

8. See AMOS TVERSKY & DANIEL KAHNEMAN, JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23–25 (Daniel Kahneman et al. eds., 1982).

9. MCGINNIS & RAPPAPORT, *supra* note 1, at 54.

er stream of information and deliberation about the amendments, improving their quality.¹⁰

Finally, a strict supermajority rule for amendments improves the quality of entrenchments by helping to create a veil of ignorance¹¹ because amendments cannot be easily repealed—they have to go through the same Article V process to be repealed.¹² Citizens and legislatures cannot be certain how amendments are going to affect themselves later in life or their children. Hence, they are more likely to consider the long-term public interest than their short-term personal interest when determining whether to support revision.¹³

Consequently, updating the Constitution through the prescribed Article V amendment process is superior to updating it through judicial interpretation because the amendment process requires a national consensus. Updating the Constitution through judicial interpretation, by contrast, gives judges discretion in choosing how our country keeps up with the times. This is problematic for three reasons. First, judicial updating of the Constitution is accomplished by a small number of Supreme Court Justices, whereas constitutional lawmaking and the amendment process require the broader participation of many people across the country. Second, the Supreme Court is drawn from a very narrow class of society—elite lawyers living in Washington, D.C., perhaps the most artificial city in the world, a classic one-company town.¹⁴ And today that narrowness is even more extreme than in the past, as each current Justice has

10. *Id.*; see also *id.* at 219 n.43 (noting that Congress has approved and sent to the states for ratification only thirty-three amendment proposals, resulting in more accurate information about and greater awareness of the merits of the proposals).

11. See Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 922–23 (1990) (explaining the veil of ignorance).

12. See, e.g., U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

13. MCGINNIS & RAPPAPORT, *supra* note 1, at 54.

14. See John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 542–43 (1999) (discussing factors that make Supreme Court Justices remote); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) (“[T]he Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between.”).

attended one of two law schools, Harvard or Yale.¹⁵ As for geographic diversity, when Justice Scalia was alive they at least hailed from four of the five boroughs of New York City.¹⁶ Finally, constitutional lawmaking is supermajoritarian, while the Supreme Court can rule five to four. These several reasons suggest that doctrines fabricated by Supreme Court Justices are not as likely as amendments to improve our Constitution.

Yet another problem with judicial updating is that it interferes with the amendment process itself. During the period when originalism was the dominant mode of interpretation, hugely important amendments were passed, including but not limited to the Reconstruction Amendments. The Sixteenth Amendment permitted the income tax,¹⁷ the Seventeenth Amendment permitted the reelection of senators,¹⁸ and the Nineteenth Amendment gave women the right to vote.¹⁹ Many of these amendments were passed by people who might have been thought to have a vested interest *against* the amendment. Two examples are the Seventeenth and Nineteenth Amendments. In ratifying the Seventeenth Amendment, state legislatures gave up their power to choose senators.²⁰ In the Nineteenth Amendment, men diluted the power of their vote by extending the franchise to women.²¹

But as non-originalism has become more powerful, the amendment process has fallen into disuse for the enactment of profound social change. And that is not surprising, for it is

15. William Wan, *Every current Supreme Court justice attended Harvard or Yale. That's a problem, say decision-making experts*, WASH. POST: SPEAKING OF SCIENCE (July 11, 2018) <https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/11/every-supreme-court-justice-attended-harvard-or-yale-thats-a-problem-say-decision-making-experts/> [<https://perma.cc/K3LW-JU67>].

16. James Barron, *A Conservative Bloc, a Liberal Bloc, and Now, a New York Bloc*, N.Y. TIMES, May 12, 2010, at A1 (noting that Justice Ginsburg was born in Brooklyn, Justice Sotomayor was born in the Bronx, Justice Kagan was born in Manhattan, and Justice Scalia grew up in Queens).

17. U.S. CONST. amend. XVI.

18. U.S. CONST. amend XVII.

19. U.S. CONST. amend XIX.

20. See U.S. CONST. art. I, § 3, cl. 1, *repealed by* U.S. CONST. amend XVII, cl. 1.

21. The U.S. Constitution, at ratification, did not explicitly limit suffrage to males, but rather stated that “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2, cl. 1.

originalism that protects the amendment process.²² If judges can change the Constitution, most people will put their energy into trying to get the right judge appointed and creating a culture where it is thought proper for judges not to be constrained by the original meaning of the Constitution.²³ Of course, that is not a hypothetical culture; at least until recently it *was* our culture. Thus originalism and the amendment process are mutually supportive. There can be no normatively attractive originalism without the amendment process because Article V permits each generation to enshrine its values in the Constitution. But equally, there can be no effective amendment process without originalism.²⁴ The Article V amendment process and originalism march under a single banner. And what does that banner read? It says, “We the People,” and not “We the Elite Judges.”

Sometimes it is said the amendment process is too difficult, and that is why we need judicial updating.²⁵ But many important, even transformative amendments have been enacted under Article V. And if we look at the six proposed amendments that have fallen just short, those that passed Congress but failed in the state legislatures, it is hardly clear that on balance we would be better off with them. One would have purported to entrench slavery beyond constitutional amendment,²⁶

22. John O. McGinnis & Michael B. Rappaport, *An Originalist Future*, 15 ENGAGE 34, 38 (2014) (“Finally, the amendment process that originalism protects permits each generation to make the Constitution its own, by deciding whether to place its additional provisions in the Constitution on much the same terms as previous generations did.”).

23. See, e.g., David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 975 (2011) (“If having a ‘living’ Constitution means having a Constitution that changes over time in ways other than by formal amendment, then in a fundamental way there is only one plausible answer to that question.”).

24. See John O. McGinnis, *How Originalism Energizes the Amendment Process*, L. & LIBERTY (Sept. 14, 2017), <http://www.libertylawsite.org/2017/09/14/how-originalism-energizes-the-amendment-process/> [https://perma.cc/X42U-4DLR] (arguing that it is living constitutionalism, not originalism, that has made the amendment process ineffective).

25. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 24 (5th ed. 2015) (referring to the amendment process as “cumbersome,” and advocating for the need for judicial amendment within a “changing society”).

26. This proposed amendment in 1861 was known as the “Corwin Amendment,” named after Rep. Thomas Corwin of Ohio, and would have explicitly barred any amendment to the Constitution interfering with the institution of slavery: “No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by

and another would have created a confusing and unworkable process for apportioning representatives among the states.²⁷ Now it is true that the Equal Rights Amendment (ERA) also came close to ratification,²⁸ but its failure illustrates the problems non-originalism poses for the amendment process.

The ERA was proposed directly after the Warren Court, which was possibly the most activist court in our history with respect to disregarding the meaning of the Constitution.²⁹ Not surprisingly, citizens were wary of giving more power to a Court that had a history of interpreting the Constitution according to its policy preferences rather than in accordance with the Constitution's original meaning. Sure enough, opponents played up the possibility that the ERA would lead to extrava-

the laws of said State." JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002*, at 118 (2d ed. 2003); see also A. Christopher Bryant, *Stopping Time: The Pro-Slavery and 'Irrevocable' Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL'Y 501 (2003) (providing a thorough background of the Corwin Amendment).

27. Originally known as "Article the first" in the First Congress of 1789, the proposed "Congressional Apportionment Amendment" stated:

After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

APPENDIX TO THE HISTORY OF THE FIRST CONGRESS, 2 ANNALS OF CONG. 1984 (1790–1791). The ramifications would have been significant: "Had that amendment been ratified then, or at some subsequent moment, and left in effect until today, in a country presently with 300 million people we would thus be talking about the first Congress following the 2010 Census having 10,000 House members. To just 100 senators." Tom Schaller, *Getting a Bigger House*, FIVETHIRTYEIGHT (Sept. 18, 2009, 8:00 PM), <https://fivethirtyeight.com/features/getting-bigger-house/> [https://perma.cc/43AC-MQXT].

28. Marjorie Hunter, *Leaders Concede Loss on Equal Rights*, N.Y. TIMES, June 25, 1982, at A13 (detailing the failure of the ERA in 1982, as it had only been passed "by 35 states, three short of the three-fourths it needed to become part of the Constitution."). The ERA stated: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong. (1972).

29. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 84 (1990) ("[A]ny correspondence between the original understanding and the Court's rulings was often accidental . . .").

gances such as unisex bathrooms during the debate over its ratification.³⁰ Moreover, the Supreme Court had already taken the wind out the sails of the ERA. Without examining the original meaning, the Court had suggested much more substantial scrutiny for sex discrimination.³¹ State legislatures could have rationally believed that if the Court was already going to take care of the problem, why should they themselves take a hard vote? The larger point is this: many constitutional amendments regarding the proper scope of federal power or the proper balance of the administrative state never came into being because of judicial updating. There are a lot of mistakes about a non-originalist interpretation of the Constitution. But one real tragedy is the constitutional amendments that have not been born.

I do not want to be accused of Panglossianism—I am not arguing that we have a perfect Constitution. So I am going to conclude by suggesting that there is one important aspect of Article V that is not a success: an effective amendment process that can bypass Congress, because we occasionally need to think about amendments that will reign in Congress's power and perquisites. For instance, hoping that Congress will muster a two-thirds majority to propose congressional term limits is like expecting that turkeys will vote for Thanksgiving. Unfortunately, as Michael Rappaport has detailed in his ground breaking work, the state petition process in Article V for amending the constitution seems largely broken.³² It has never

30. James C. Clark, *Fear of Unisex Bathrooms Doomed the ERA*, ORLANDO SENT. (Apr. 28, 1991), http://articles.orlandosentinel.com/1991-04-28/news/9104280615_1_equal-rights-amendment-senate-the-amendment-two-votes [https://perma.cc/TY5M-7D9Y] (“After the Senate failed to pass the bill, opposition began to develop. Conservative groups claimed that the amendment would actually hurt women, lead to unisex bathrooms and force women to take part in combat.”); Allison K. Lange, *The Equal Rights Amendment Has Been Dead for 36 Years. Why It Might Be on the Verge of a Comeback.*, WASH. POST (June 18, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/18/the-equal-rights-amendment-has-been-dead-for-36-years-why-it-might-be-on-the-verge-of-a-comeback/> [https://perma.cc/WXV3-MKSK] (“Advocates [against the ERA] convinced lawmakers that the amendment would force women to sign up for the draft, decriminalize rape, allow for same-sex marriages, give men permission not to support their families and require Americans to use unisex toilets.”).

31. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny in a sexual discrimination claim under the Equal Protection Clause of the Fourteenth Amendment).

32. Michael B. Rappaport, *The Constitutionality of a Limited Convention*, 28 CONST. COMMENT. 53, 55 (2012) (“The convention method simply does not work.”).

been invoked in two centuries.³³ We can explain the reasons for that history. It is unclear, for instance, what the agenda of the convention that the states would call would be. Some people even think that the scope of the convention would be unlimited, and that makes a lot of very rational people wary of making the whole Constitution up for grabs.³⁴ An amendment to the amendment process could fix that process.

I am not especially partial to any particular language, but Michael Rappaport has the best proposal that I have seen.³⁵ Let state legislatures come up with a common proposed amendment, and it will automatically go to the states for ratification, without intervention by Congress.³⁶ It would be ratified by the same process by which amendments proposed by Congress are ratified.³⁷ With that one change to the amendment process aside, the most important thing that can be done for the amendment process is to follow the original meaning of the Constitution.³⁸ That in turn will create a more vibrant culture of constitutional democracy where social movements push their own constitutional amendments, and we will have a nationwide debate about them.³⁹

This proposed amendment only addresses what is clearly broken in Article V: the state petition process. The related question of whether we should amend the Constitution to change the degree of supermajoritarian consensus for any amendment is a very difficult one. We certainly do not want the amendment process to be any harder than it already is. And it may well be, on balance, a useful amendment to move in the direction of a weaker supermajority requirement—for instance, we could still require the approval of three-quarters of the states,

33. *Id.* (“Not only has it never been used to enact an amendment, but no convention has ever been called” (citation omitted)).

34. *Id.* (“The most important reason why the convention method does not work is the fear of a runaway convention.”).

35. See Michael Rappaport, *Revisiting the Constitution: End Congress’s Monopoly on Amendments*, N.Y. TIMES: ROOM FOR DEBATE (Nov. 3, 2016, 5:45 PM), <https://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-end-congresss-monopoly-on-amendments> [<https://perma.cc/47N7-BVK2>].

36. *Id.*

37. U.S. CONST. art. V.

38. See McGinnis, *supra* note 24.

39. See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 49–50 (2005).

but measured by population. That would make it more difficult for just a few states to hold out.

Nevertheless, it is important to look at the amendments that came closest to succeeding. As noted above, there are a number of very problematic amendments that came close to ratification.⁴⁰ So in my view the greatest problem, and the greatest reason that we had a disappearance of potentially good amendments, is the idea that judges could *create* constitutional law. This bad idea generated tremendously different incentives in the constitutional change process, moving us to focus on the Court rather than our fellow citizens. The most important step for revivifying the amendment process is thus not amending the Constitution but instead reading the Constitution as it is written.

40. See *supra* notes 26–27 and accompanying text.